PP

v.

DAVID CHUNG NYUK VUI

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 41-35-2006-II]
23 JULY 2007

CRIMINAL LAW: *Penal Code - Section 321 - Voluntarily causing hurt - Prima facie case - Medical report - Service on accused - Whether sine qua non for successful prosecution - Duty of prosecution - Discretion of court*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Voluntarily causing hurt - Elements of offence - Whether established - Whether accused's defence ought to have been called*

CRIMINAL PROCEDURE: *Report or certificate - Medical report - Service on accused - Criminal Procedure Code, s. 399*

CRIMINAL PROCEDURE: *Report or certificate - Medical report - Whether sine qua non for successful prosecution of accused on charge of assault*

CRIMINAL PROCEDURE: *Prosecution - Duty of prosecuting officer - Diligent prosecution of case - Whether failure to do so ought to result in discharge not amounting to acquittal*

This was an appeal by the prosecution against the learned magistrate's decision that a *prima facie* case had not been established solely on the ground that the medical report of the case was not served on the accused. The accused was charged under s. 321 of the Penal Code with assaulting the complainant in a coffee shop. The complainant had lodged a complaint and had shown the injury to the investigating officer, who referred him to the hospital wherein the doctor had issued a medical report. Many attempts were made to serve the report on the accused but the investigating officer said that he had avoided service. The prosecution had unsuccessfully made several attempts to procure the doctor to give evidence. Finally, the learned magistrate directed the prosecution to close its case and after hearing submissions, ruled that there was no *prima facie* case. The issues that required determination were: (i) whether the medical report

was wrongfully excluded; (ii) whether the medical report, on the facts of the case, was a *sine qua non* for a successful prosecution; (iii) whether the appellant had established all the elements of the offence to satisfy the requirement of a *prima facie* case; and (iv) what should be the order in the event the court takes the view that the prosecution is indolent in prosecuting the case and continuously seeks adjournment to clog the administration of criminal justice with total disregard to scarcity of time.

Held (allowing the appeal):

(1) If attempts had been made by the public prosecutor to deliver a copy of the report to the accused and it could be shown, as in this case, that the accused had refused to accept service, then the criteria in s. 399 of the Criminal Procedure Code would be deemed to have been satisfied as the accused could not complain that he had been prejudiced. As this case was related to assault, the medical report was not *sine qua non* for the prosecution of the case. Moreover, if the court was satisfied from the evidence adduced through the prosecution witness that there was assault, the elements of s. 321 of the PC was satisfied. From the evidence adduced, it was clear that the prosecution had established a *prima facie* case for voluntarily causing hurt and the accused's defence ought to have been called. On the issue on whether it was appropriate for the learned magistrate to direct the prosecution to close their case notwithstanding the fact that the medical officer could not be diligently procured to give evidence, the court had a general discretion to make the necessary orders according to the justice of the case. The right to prefer a charge and prosecute vested in the prosecution. However, once the matter comes before the court, there is a duty and obligation on the part of the prosecution to proceed according to law without being indolent and seeking adjournments. In cases where the prosecution does not diligently prosecute the case, the right order to be made is to discharge the accused, not amounting to an acquittal, rather than directing the prosecution to close its case as done in this case. (paras 8, 9, 11, 12 & 13)

[Order accordingly.]

Case(s) referred to:
Chong Yik v. PP [1953] MLJ 72 ***(refd)***
In re Nachalk AIR [1941] Mad 746 ***(refd)***
Jashanmal AIR Sind 19 ***(refd)***
Mek Awang v. Che Mas Awang [1948] 14 MLJ 36 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 259, 399, 422
Penal Code, ss. 319, 321, 323

For the appellant - Steve Ritikos DPP
For the respondent - See Chee How; M/s Baru Bian & Co

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the prosecution's appeal against the decision of the learned magistrate who ruled that a *prima facie* case has not been established solely on the ground that the medical report of the case was not served on the accused.

[2] The accused was charged for assaulting the complainant in a coffee shop in the presence of his mother. The complainant had lodged a complaint and shown the injury to the investigating officer, PW3 who referred him to the hospital wherein the doctor had issued a medical report. Many attempts were made to serve the report on the accused but the investigating officer says that he had avoided service. The prosecution had made several attempts to procure the doctor to give evidence but was not successful. Finally the learned magistrate directed the prosecution to close its case and after hearing the submission ruled that there was no *prima facie* case. The grounds of the judgment read as follows:

> The charge against the Accused is as follows:
>
> That you on the 11th day of May 2000 at about 8.45 am at the front of Lian Jun Coffee shop, BDC Stampin, Kuching in the State of Sarawak, knowingly and voluntarily cause hurt to one Desmond Terrence Kong (m) by punching him and you thereby committed an offence punishable under s. 323 of the Penal Code.

To substantiate the charge it must necessarily be shown that the Accused had committed the act with the intention or knowledge to cause hurt and does thereby cause hurt to the complainant. In this case, the Prosecution had called three witnesses. PW1 and PW2 who spoke on the occurrence testified that the Accused attacked them while they were having breakfast at the said coffee shop. Upon seeing them, the accused uttered foul words towards them and first attacked PW1 with his right hand. According to PW1, he was hurt on the right hand and right shoulder. Police report no. 2311/2000 (exhibit P1) was lodged pursuant to the incident. The evidence of PW1 was corroborated by the evidence of PW2, PW1's mother who said that she recognized the Accused as their neighbour. PW2 also said that this is not the first time such incident happened.

PW3, the Investigation Officer of this case confirmed that the complainant (PW1) was referred to a Medical Officer after the report was lodged. Nevertheless, the report was not served on the Accused neither was the maker of the report called to give evidence. In cross examination, PW3 said that the charge was preferred solely on the basis of the report lodged by the complainant. Upon instruction of his Officer, the Accused is then charged for causing hurt. PW3 admitted that he had never visited the scene or interviewed any other witnesses who have witnessed the morning incident at the coffee shop. In short, the evidence of PW3 seemed to reveal that there was never any proper investigation into the matter.

Although PW1 and PW2 both pointed to the Accused as the person responsible for the purported injuries, it is discernible to me that no evidence was ever led to establish the fact that the complainant (PW1) was indeed injured. It is trite law that the Prosecution must not only prove that an offence has been committed but that the offence was committed by the Accused person. To establish that hurt was caused to the person, it would be pertinent for the medical report to be tendered or the Medical Officer to be called to give evidence. In this case, this was not at all proven.

In the light of all evidence adduced before me, the following conclusions can be drawn:

1) Both PW1 and PW2 testified to the effect that PW1 was hurt and that hurt was inflicted by the Accused in a quarrel that ensued.

2) PW2 referred PW1 to a Medical Officer but no medical report whatsoever was tendered before this court.

3) According to PW3, charge was preferred based only on the complainant's report. No thorough investigation was conducted because he believed the complainant.

Now, the question I have to decide is whether at the end of the Prosecution's case, there was sufficient evidence to convict the Accused if he elects to remain silent. The case of *Looi Kow Chai v. PP* [2003] 2 MLJ 65 and *Balachandran v. PP* [2005] 1 CLJ 85 referred. The Federal Court in the case of *Balachandran (supra)* had defined a *prima facie* case as one that is sufficient for the Accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

… the test at the close of the Prosecution's case would therefore be: is the evidence sufficient to convict the Accused if he elects to remain silent? If the answer is affirmative then a *prima facie* case has been made out.

... as the Accused can be convicted on the *prima facie* evidence, it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt.

The Prosecution's case rests on a first information report alone and nothing else. Applying the maximum evaluation test I reiterate that the Prosecution had not made out the ingredients of the charge sufficient to prove a *prima facie* case. No evidence was adduced to show that PW1 was indeed hurt at the material time and no independent witnesses were called to prove that the assailant was the Accused person. I do not think that the Prosecution would have any problem finding other independent eye witnesses since the incident occurred in a busy coffee shop. The Investigating Officer did not adequately explain the lackadaisical attitude in his investigation other than the fact that he believed the complainant. That said, I hereby discharged and acquitted the Accused without calling for his defence.

[3] The appellant, dissatisfied with the decision, had filed a petition of appeal which inter alia says that: the learned magistrate erred in law and in fact (i) in her finding when she failed to properly evaluate the evidence adduced through the prosecution's witnesses, ie, PW1, PW2 and PW3. (ii) when she held in her judgment that no medical report was served on the accused without giving weight to the evidence of PW3 that the medical report was served but the accused purposely rejected it. (iii) when she ordered the prosecution to close their case without giving them the opportunity to call the medical officer of whom the

A medical report should be tendered. (iv) when she emphasised too much on the method of investigation instead of the prosecution's evidence against the accused.

[4] The appellant concludes that the learned magistrate's B decision in acquitting and discharging the respondent is most unsatisfactory and cannot be supported, when considering the fact of the weight of the evidence adduced by the prosecution.

[5] The appellant *inter alia* submits as follows:

C (a) the learned magistrate was wrong when she ordered that the prosecution close its case without giving the opportunity to the prosecution to call the medical officer. The prosecution does not dispute that the learned magistrate had granted a final adjournment to the prosecution. However, she was wrong to have made such D an order and thereafter discharged and acquitted the accused without the defence being called. When the learned magistrate ordered the prosecution to close its case, the prosecution had not yet tendered "all such evidence" before the Court (pursuant to section 173 (c) of the CPC). In *PP v. Chin Shin Thiam* [2005] 8 CLJ 493, it was stated:

E

> In the case of *PP v. Zainuddin & Anor* [1986] 2 MLJ 100, the Supreme Court dealt with the same issue. In that case the respondents/accuseds were first charged in 9 November 1976 but the case against them had been postponed no less than twelve times since then to the date when the F magistrate ordered acquittal of the respondents/accused. The prosecution asked for revision but was rejected. The Supreme Court granted leave to have the following question determined:
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> G
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> > In view of the art. 145(3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right for a magistrate in a summary trial to acquit and discharge an accused without hearing any evidence of the prosecution.
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> H The Supreme Court overruled the case of *PP v. Mohamad Said* [1984] 1 MLJ 50 and held that magistrates have no power to discharge and acquit until such time that all available prosecution evidences have been produced in court. The Supreme Court was crystal clear in overruling *PP v. Mohamad Said (supra)* as evident in the judgment of I Salleh Abbas LP (as he then was) which reads as follows:

He (Mohamed Azmi J in *Mohamad Said*'s case) thus based his ratio upon a narrow construction of para (c) of s. 173 of the Criminal Procedure Code ('the CPC'). This paragraph says:

If the accused refuses to plead or does not plead or claims to be tried, the court shall proceed to hear the complainant (if any) and to take **'all such evidence as may be produced in support of the prosecution case.** (emphasis added.)

He construed the emphasized phrase to mean only **'all such available evidence as may be produced in support of the prosecution at the trial'** (again the emphasis added), thereby excluding the evidence which is not so available, even though such evidence is material and needed by the prosecution to support its case and as such a postponement is sought for in order to make it available. The result is, according to the learned judge's ruling that where material evidence (evidence in support of the prosecution) is not available at the trial the court may, by refusing adjournment, treat the case of the prosecution as at an end and acquit the accused under para (f) of s. 173 of the CPC.

We do not accept this narrow construction as it is plainly contrary to the wording of para (f) which is as follows:

> If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.

Under this paragraph an order of acquittal can be recorded only (1) when 'all the evidence hereinbefore referred to' has been taken and (2) when the court finds no case against the accused 'has been made out which if unrebutted would warrant his conviction ... .

When does the court make a finding as to whether a case against the accused is made out or not? Surely, at the close of the prosecution case. And what is the basis on which such a finding is made? The answer must be that the finding is made on the basis of 'all the evidence hereinbefore referred to.' Now what does this phrase mean? Whilst we accept the view of

A Mohamed Azmi J in that whatever this phrase means it must bear the same meaning as does the phrase 'all such evidence as may be produced in support of the prosecution case' appearing in para. (c), we do not however agree that these two phrases only mean 'such
B evidence as is available at the trial.' In our view, these phrases also include evidence not available on the date of the trial as long as such evidence is material and needed to support the prosecution case.

Yet, if we accept the narrow construction in *Mohamed*
C *Said*'s case the court can acquit the accused at any stage irrespective of whether it has heard some evidence or none at all. Both cases – partly heard and not yet heard cases – are in the same position in that they run the risk of being frustrated by the court refusing an adjournment, necessitating the making of
D an order of acquittal if the evidence needed to support the prosecution case is not available on the day of the trial. This is plainly contrary to the decision in *Kuppusamy*'s case.

In our view the court has no such power before the
E end of the prosecution case, whether the evidence has been given or not. The phrase 'all such evidence as may be produced' appearing in para. (c) of s. 173 of the CPC of course has the same meaning as the phrase 'all the evidence hereinbefore referred to'
F appearing in para. (f). But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted ...

G In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, paras. (c) and (f) of s. 173 of the CPC do not empower the court to order a discharge amounting to an acquittal of an accused person
H without hearing evidence of the prosecution in support of its case.

This court is bound by the judgment of the Supreme Court. Learned counsel for the respondent in fact conceded that the magistrate in this case had no power to discharge and acquit. As
I such I hereby set aside the learned magistrate's order of discharge and acquittal of the respondent.

(b) the evidence of PW3 reads as follows:

> Saya ada hadir menyampaikan laporan perubatan kepada tertuduh di bawah seksyen 399 CPC tetapi tertuduh enggan menerimanya. Saya tidak ingat bila saya cuba serahkan tapi memang ada.

The evidence clearly showed that the witness PW3 attempted to serve the medical report under section 399 of the CPC but it was the accused who refused to accept receipt of the same. The fault does not lie in prosecution but on the accused himself. The witness was never cross-examined nor put to the witness that PW3 had never attempt to serve the said notice/medical report on the accused. (c) there is ample evidence from the evidence of PW1, PW2 and PW3 that the complainant was indeed injured from the assault by the accused on PW1. It is also proven that on the said day and time, it was the accused who assaulted PW1 and thereby caused injuries to PW1. (d) the learned magistrate was wrong when she said in her judgment:

> No evidence was adduced to show that PW1 was indeed hurt at the material time and no independent witnesses were called to prove that the assailant was the accused person. I do not think that the Prosecution would have any problem finding other independent eye witnesses since the incident occurred in a busy coffee shop.

It is the prerogative of the prosecution to call any number of witnesses, provided the ingredients of the charge have been sufficiently proved. Here, PW2 corroborated the evidence of PW1 that it was the accused who assaulted the complainant and thereby caused injuries to PW1. Therefore, there is no necessity to call any other witnesses to confirm further of the fact. In *Public Prosecutor v. Subramaniam* [1968] 1 LNS 112, the court said:

> As regards the observation of the learned president, I feel that such an observation that the case was not properly investigated is uncalled for and is strictly outside the duty of the learned president. Not having seen the investigation papers, it is hardly right for the learned president to make such comments. His concern is merely to decide whether or not a *prima facie* case has been made out to justify calling upon the defence. Whether or not to call the so-called independent witnesses is according to the long line of cases a discretion for the prosecution. These cases show that it is not incumbent on the prosecution to call every witness present at the scene.

[6] To determine the fate of the appeal, I have to decide the following: (i) whether the medical report was wrongfully excluded. (ii) whether the medical report on the facts of the case is a *sine qua non* for a successful prosecution. (iii) whether the appellant has established all the elements of the offence to satisfy the requirement of a *prima facie* case. (iv) what should be the order in the event the court takes the view that the prosecution is indolent in prosecuting the case and continuously seeks adjournment to clog the administration of criminal justice with total disregard to scarcity of time.

[7] In this case the investigating officer had given evidence that he made many attempts to serve the medical report but the accused evaded the service and/or refused to accept the same. The relevant part of the evidence of the investigating officer reads as follows:

> Menurut pengadu, dia sedang minum bersama ibunya di kedai kopi Lian Jun. Datang seorang lelaki yang dikenali sebagai jiran rumahnya dan terus menumbuk complainant di bahagian badan sebelah kanan.
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> Saya ada ambil kenyataan pengadu. Saya keluarkan borang SC 133 untuk pengadu menjalani rawatan di Hospital.
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> Saya tidak pergi ke tempat kejadian. Saya ada ke rumah tertuduh, tapi dia sentiasa tidak di rumah. Rumah sering berkunci.
>
> Saya terima laporan perubatan bagi Desmond.
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> Saya ada hadir menyampaikan laporan perubatan kepada tertuduh dibawah Seksyen 399 CPC tetapi tertuduh enggan menerimanya.
>
> Saya tidak ingat bila saya cuba serahkan tapi memang ada. Saya kenal dengan DAVID CHUNG, tapi tidak pernah bercakap dengan dia. Cuma melalui maklumat orang balai.
>
> Tertuduh selalu datang ke Balai untuk buat report. Tertuduh berada di Court dan berada dalam kandang sekarang.

[8] In my view, s. 399 of the Criminal Procedure Code (CPC) places a duty on the public prosecutor to deliver a copy of the report to the accused. If attempts have been made to deliver and if it can be shown as in this case that the accused had refused to accept service then the criteria stated in s. 399 is deemed to have been satisfied as he cannot complain he was prejudiced. Further, service of the said report can be made at the time the accused is

being charged or other mention dates before the hearing date. When looking at s. 399, the trial court must differentiate between non service and failure of the accused to accept service. Section 399 of CPC states as follows:

> This section permits report by the persons mentioned in the section to be admitted in evidence. The said persons among others are officers of the Institute of medical research; government medical officers; chemists; document examiner; Inspector of weights and measures; etc. To rely on this section the public prosecutor must serve a copy of the report to the accused not less than ten days before the commencement of trial.

In *Chong Yik v. PP* [1953] MLJ 72 it was contended that the certificate of the government chemist was wrongly admitted in evidence, as a copy of the report had not been supplied to the accused as required by the CPC. The High Court held that the proviso to s. 399(1) of the CPC is a condition precedent and if it is not complied with, the document cannot be admitted under the section. Further the court stated that in this case the document was wrongly admitted in evidence and that wrongful admission was an irregularity, which could not be cured under s. 422 of the CPC.

[9] Medical reports and chemist reports and alike in some cases; in that it will be a *sine qua non* for the prosecution to establish the elements of the offence. On the facts of this case, I do not think the medical report is a *sine qua non* for the prosecution of the case, as this case is related to assault. Moreover, if the court is satisfied from the evidence adduced through the prosecution witness that there was assault, the elements of the section is satisfied.

[10] What the prosecution must prove to establish the element of the offence of voluntarily causing hurt to attract the punishment provided for in s. 323 of the Penal Code (PC) is stated in s. 321 as follows:

> Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

The term "hurt" is defined in s. 319 of the PC to mean:

> Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

There are a number of cases which have dealt with the provisions of ss. 319, 321 and 323 of the PC. The Indian sections are also *pari materia* to our sections. The decisions of the courts in relation to hurt can be summarised as follows: (i) there need not be any direct physical contact to cause hurt. (See *Jashanmal* AIR Sind 19). (ii) where there is no intention to cause death or grievous hurt, the harm inflicted may be hurt only. (See *In re Nachalk*, AIR [1941] Mad. 746). (iii) in *Mek binte Awang v. Che Mas binte Awang* [1948] 14 MLJ 36, the court opined:

> This is a revision of the proceedings before a Magistrate on a private summons for voluntarily causing hurt under Section 323 of the Penal Code.
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> Both parties are married women living in the same kampong. The complainant is aged about 25 years and the accused in her teens. There has been jealousy between them over family affairs.
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> The complainant's story, which was supported with consistent detail by two witnesses, was that while she was bathing at the well near her house, the accused came and assaulted her; all three testified that the accused was alone.
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> The accused admitted a scuffle but stated that it took place on the public road and that the complainant provoked the incident by throwing water on her. This was supported by one witness, her niece, aged about 13, who did not see the two witnesses for complainant.
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> At the close of the case the learned Magistrate wrote:
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> According to the evidence both accused and complainant guilty of affray. Cautioned and discharged.
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> The complainant was dissatisfied and sent what is in substance a petition of appeal to the Public Prosecutor who submitted the case to the High Court with a view to revision.
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> In his Grounds of Judgment the Magistrate says that among the local Malays especially women, whenever one hits another with the hand, the other will automatically challenge and thus commit an affray; he has seen such occurrences many times. From the evidence he found it difficult to conclude which side was telling

the truth but by putting the evidence of both sides together he found that they had committed an affray and, therefore, convicted them both, the complainant as well as the accused. But taking into consideration that the fight was not serious and neither of the women suffered any injury they were cautioned and discharged.

On the facts of the case, Taylor J opined as follows:

As regards the conviction for affray two points arise. First on the facts – not every fight is an affray; the essence of affray is breach of the peace and this offence is not committed unless the fight is in a public place. He could not properly have convicted them of affray unless he was satisfied that the fight in question took place at the cross roads, as alleged by the accused, and not at the well in complainant's compound as alleged by the complainant, and he did not so find. Secondly, on legal procedure – the accused was never charged with affray; there are cases when re-charging is not necessary, eg, on a charge for causing grievous hurt, if the hurt is proved but not the intention to cause grievous hurt, the accused may be convicted of voluntarily causing (simple) hurt without formal amendment because the greater includes the less. But if the alternative offence, even though less serious, involves some other ingredient, such as being in public, then the charge must be altered and the alteration explained and the accused must plead again.

Finally, the Magistrate's order was neither clear nor correct. The expression "cautioned and discharged" has, no doubt, been used in the past but it is not authorised by law and it is not satisfactory in practice because it leaves the matter in doubt whether the Court actually found the accused guilty of an offence or not.

The Code requires that where a person is found guilty of an offence, he must be sentenced according to law. If the offence is considered trivial, the appropriate course is to impose a nominal fine, such as one dollar or even 10 cts. There are three exceptions to this:

(a) A youthful offender may be convicted, admonished and discharged under Section 293;

(b) A first offender may be convicted and released on probation, under Section 294;

(c) In special circumstances set out in Section 173A a charge may be dismissed, provided that a conviction has not been recorded.

> In all cases it is important that the record should clearly show what has been decided and what was the actual order. It is a very grave mistake to regard these matters as in the nature of "red tape" or to disregard any of them even in a trivial case. A great many of the important rights of the subject under the English law are not expressed in any substantive statute but are guarded and enforced only by rules of procedure. This may, and indeed does, make the Codes cumbersome and in some ways difficult to follow but – however difficult it may be, Magistrates must study them closely and apply them strictly, in all circumstances.
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> In my opinion, the evidence in this case was sufficient to show that the accused had committed an assault of a more than trivial character on the complainant and the Magistrate should have found the accused guilty accordingly under Section 323. In exercise of the powers of revision, I accordingly amend the conviction of the accused for affray to a conviction for causing hurt but in view of her youth and of the facts that the assault was not very serious and that the two families are connected, I think it is sufficient to release her as a first offender on giving a bond with one surety for $25/- or her good behaviour for 3 months under Section 294 of the Code.

[11] From the facts of *Mek*'s case *(supra)*, it is evidently clear that a medical report is not a *sine qua non* for the prosecution to bring home a charge under s. 321 of the PC which is punishable under s. 323 of the PC.

[12] From the evidence adduced, it is clear that the prosecution has established a *prima facie* case for voluntarily causing hurt and defence ought to have been called.

[13] On the issue whether it is appropriate for the learned magistrate to direct the prosecution to close their case notwithstanding the fact that the medical officer cannot be diligently procured to give evidence, I take the view that the court has a general discretion to make the necessary orders according to the justice of the case. In this case the proceeding of the medical officer is not a *sine qua non* for the prosecution's case. The right to prefer a charge and prosecute vest in the prosecution. However, once the matter comes before the court, there is a duty and obligation on the part of the prosecution to proceed according to law without being indolent or seeking adjournments. In such instance, the court may make such orders as the justice of the case may warrant. Support for my proposition can be garnered from s. 259 of the CPC which reads as follows:

Power to postpone or adjourn proceedings.

(1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time:

Provided further that where a Government Medical Officer has certified that the complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.

(2) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reasons for it.

Explanation – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

In cases where the prosecution does not diligently prosecute the case, the right order to be made is to discharge the accused, not amounting to an acquittal, rather than directing the prosecution to close its case as done in this case.

[14] For reasons stated above, I allow the appeal and make the following orders:

(i) the decision of the learned magistrate dated 4 August 2006 be set aside with a direction that defence be called.

(ii) the matter be fixed for mention before the Magistrate's Court today for issues of bail to be dealt with and to fix a date for hearing of the defence case.

I hereby order so.